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In the

Supreme Court of the United States

OCTOBER TERM 1969

No. [illegible]

MACAULEY-NICHOLS TOOL [illegible] corporation, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Claims

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THE ARGUS PRESS SEATTLE

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TO THE SUPREME COURT OF THE UNITED STATES:

Petitioner Makah Indian Tribe, a corporation, prays that a writ of certiorari issue to review the Order of the United States Court of Claims entered in the above-entitled case on December 1, 1960.

CITATIONS TO OPINIONS BELOW

The Order of the Court of Claims of December 1, 1960, is printed at Appendix p. 1A, *infra*. There was no opinion by the Court, only by the dissenter, which is unreported. The opinion of the Indian Claims Commission of April 15, 1959, printed in Appendix p. 3A, *infra*, is reported at 7 Indian Claims Commission 477.

JURISDICTION

The judgment and order of the Court of Claims was made and entered on the 1st day of December, 1960, Appendix p. 1A, *infra*. Jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1255 (1).

QUESTIONS PRESENTED

Prior to 1855 the Makah Indians subsisted almost entirely on the products of the sea, a substantial proportion of which consisted of seal and halibut. Their rights to these were unrestricted and unregulated.

By the provisions of the Treaty of 1855 between the Makah Indian Tribe and the United States, the Indians were "further secured" in their rights to fish and seal. The Whites were granted the right to fish "in common" with the Indians. Thereafter the Whites so plundered the halibut and seal resources that the very existence thereof was threatened. Regulation was reasonably required to control the depredation of the Whites. The regulations, imposed pursuant to International Treaties, were made equally (as to halibut) or substantially so (as to seal), applicable to the Makah Indians, and were of such nature as to practically eliminate the Indian catch.

1. Are such regulations a breach of the Treaty of 1855, without any showing that the fishing or sealing of the Indians were any threat to the resources or the rights of the Whites?

2. Is it a fair construction of the Treaty to say that the right to take halibut is "further secured" to the Indians in regulations which impose seasonal limitations and other restrictions which, as a practical matter, manifestly favor the Whites?

3. Is it a fair construction of the Treaty to say that the right to take seal is "further secured" to them by regulations which limit their right to take seal to the

archaic and aboriginal methods employed by them in 1855?

TREATIES, STATUTES AND REGULATIONS INVOLVED

The Treaties involved are:

1. Treaty with Makah, 1855, 12 Stat. p. 939, Appendix p. 19A, reading in part as follows:

> "The right of taking fish and of whale or sealing at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the United States. * * * "

2. International Convention-Fur Seals, 37 Stat. at L. (Treaties and Conventions) p. 68, Appendix p. 24A.

3. Canada—Halibut Fishery Convention, 50 Stat. at L. 1351, Appendix p. 38A.

Statutes involved are:

1. 16 USC, Sec. 631, Appendix p. 36A, and its predecessor Acts. See list at Appendix p. 37A.

2. Northern Pacific Halibut Act of 1937, 16 USC, Sec. 772, Appendix p. 45A.

3. Indian Claims Commission Act, 25 USC, Sec. 70, Appendix p. 53A.

Regulations involved are:
50 CFR, Part 301, Appendix p. 48A.

STATEMENT OF THE CASE

Procedural Progress of the Case

The instant cause arises from a claim for damages filed by the petitioner against the United States before

the Indian Claims Commission, pursuant to the terms of the Indian Claims Commission Act, 25 USC, Sec. 70A, Appendix p. 53A. The substance of the claim was, and is, that the United States breached its treaty with the petitioner regarding the Indians' right to seal and take halibut. The Indian Claims Commission entered its order on April 15, 1959, dismissing petitioner's action. Appendix p. 55A. The matter was appealed to the Court of Claims pursuant to the provisions of the Indian Claims Act, 25 USC Sec. 70(s), and on December 1, 1960, the Court of Claims entered its order affirming the dismissal, one Judge dissenting. Appendix p. 1A.

The Indian Claims Commission found that the petitioner was an identifiable group of American Indians within the meaning of Section 2 of the Indian Claims Act, and had the capacity to maintain the suit and that the matter was properly before the Commission under Clause 1 of Section 2 of the Indian Claims Commission Act, but dismissed the petition on the grounds that no breach of treaty was shown.

Background Relating to the Treaty Provision as to Fishing and Sealing

At the time of the treaty of 1855, the Makah Indians occupied the Northwest tip of the continental United States, sometimes known as Cape Classet, or more commonly known as Cape Flattery. The Makah Indians were of different ethnic origin than other continental United States Indians. Seventy-five to ninety per cent of their subsistence was obtained from the sea. They were greatly noted for their seafaring ability. The

Claims Commission quoted the following from Swan, a noted Northwest historian:

> "* * * * The Makahs are particularly dextrous in handling their canoes, and proceed in them fearlessly many miles from land in pursuit of whales or seals, or for fishing in the halibut banks fifteen miles northwest from the Cape."

When Governor Stevens came to negotiate the treaty with the Makah Indians, they informed him that their subsistence depended upon fish and seal and in particular the halibut. The minutes kept by Governor Stevens reflect that one Indian said:

> "He was willing to sell his land: All he wanted was the right of fishing"

and another:

> "He wanted the sea. That was his country."

and that Governor Stevens assured them of their continued rights to fish and seal and that he promised them lines, implements and materials to use in these endeavors.

The fur seal was important not only for the meat but because the fur was used for clothing, rugs, blankets and doors of the long house. The blubber was made into oil. The stomach of the seal was cleaned and used to store seal oil. Seal oil was used for cooking and for fruit and vegetable preserving and as a medicinal dressing on the body and was sold in large quantities at the time of the treaty. Seal bladders and whole seal skins were tied and used for floats in harpooning whale and other seal and as floats to which to attach the large

halibut hooks. The halibut was their most important food fish because it cured and dried better than other species.

Background Leading to Regulation

The fur of the seal was of course valuable to the white man. Within 50 years after the execution of the Treaty the white man by the use of sealing schooners and firearms had reaped a tremendous harvest and threatened the seal herd with extinction. To bring an end to this folly the United States of America entered into treaties with Russia and Japan which forbade all sealing except by the United States Government and enacted laws making it a crime to kill or take fur seal. Ever since these treaties and the statutes enacted in enforcement thereof, the United States has harvested the seal crop at the rookeries in the Pribilof Islands. It annually sends its crews to the Islands by modern steamships and probably by air to harvest the seal with the most modern means known. It markets the furs and distributes the proceeds pro rata to the Governments of Russia and Japan in accordance with the treaties. While reserving to itself the right to take seal in the most modern manner, the United States by the treaties with Russia and Japan and by its statutes reserves to the Makah Indians only the right to catch seal in the identical manner which they used in 1855, that is to say, by open boat without deck or motor propulsion and without the use of firearms. It is made a crime for them to hunt seal otherwise. This method is so antiquated and hazardous and the Indians have so far lost their ancient skills that it is impractical to the point that no

seal at all are now harvested by the Makah Indians. This bare reservation to the Makahs of this ancient and now useless method of sealing is now claimed by the United States as being full faith compliance with the treaty.

Similarly, as to halibut, but later in time, and particularly after the railroad to the Northwest made fish more marketable, the whites converged upon the halibut banks, including those traditionally fished by the Makah Indians, in such tremendous numbers and with such improved vessels, gear and techniques that the specie was threatened with extinction. To remedy the crisis created by the greed of the white fishermen the United States entered into a treaty with Canada, creating an international commission with authority to fix limits and seasons for the halibut catch. The seasons so established have been as short as two weeks and as long as two months. No exception was made for the Indians and their fishing in violation of the seasons or limits so established has been made a crime by statute. The shortness of the season established and the fact that it comes in the spring of the year when the weather and seas are often not suitable for the small boat fishing engaged in by the Indians has substantially impaired the Indians' halibut fishing activities.

Although the United States introduced into evidence hundreds of documents relating to the depletion of both the seal herd and the halibut supply, there is no evidence that the activities of the Indians ever posed any threat to the supply of seal or halibut.

Present Situation

At the present time as a result of the restrictions which have been imposed upon the activities of the white man, both the seal and the halibut are at near optimum levels according to the respondent's own expert witnesses and the harvest obtained by the United States Government in the case of the seal and the white fishermen in the case of the halibut is almost all that could possibly be expected from the grounds and the area inhabited by the seal and the halibut, and of this the Indians get little or none.

Position of the Courts Below.

The Indian Claims Commission, Appendix p. 3A *ff.* indicated that it felt the Treaty rights were limited by an implied condition that there was a right to regulate if conservation measures were reasonably necessary, and relied on the language of this Court in *United States v. Winans*, 198 U.S. 371 (1905) and *Tulee v. Washington*, 315 U.S. 68 (1942); or that treaty rights, even if not so limited, were subject to lawful impairment, if necessary for conservation. Which of these alternate lines of reasoning formed the basis of the Commission's decision is not clear to petitioner.

Petitioner's Position

Petitioner's position is that the only limitation upon the treaty rights is that the Indians agreed to whatever regulation was necessary to restrain the Indians from any conduct which would interfere with the right of the Whites to fish "in common", and this would include restraining the Indians from destroying the resource.

Petitioner, reading them differently, relies on the same two cases as did the Indian Claims Commission. Judge Madden of the Court of Claims, dissenting, agrees with petitioner in theory that, to impose regulations upon the Indians, consistently with the Treaty, it was not sufficient to show that the regulations were necessary as to the Whites, but it must also be shown that the activities of the Indians had made them necessary:

> "Here, I think the Government should be required to show that it's regulatory purposes could not be accomplished without the restrictions on the Indians. It is clear that the scale of fishing done by the Whites was much larger than that done by the Indians, and the Government has not shown that it could not have done an adequate job of conservation by limiting only the activities of the Whites, and leaving the Indians to pursue their own smaller-scale operations, which they had a right, under the Treaty, to carry on." Appendix p. 2A.

The second, or alternate, basis of decision of the Commission, was that the United States has sovereign power to impose conservation regulations. As to this, petitioner concedes the existence of the sovereign power, but believes that if its exercise violates a treaty (contractual) right of petitioner, a cause of action for damages arises if the sovereign has waived immunity to suit as it has here under the Indian Claims Commission Act.

REASONS RELIED ON FOR THE ALLOWANCE OF THIS WRIT

This Case Involves an Important Question of Federal Law in the Interpretation of the "Stevens" Treaties and Directly Raises the Problems Left Open by *United States v. Winans*, 198 U.S. 371 (1905) and *Tulee v. Washington*, 315 U.S. 68 (1942)

The treaty here involved is one of the so-called "Stevens" treaties. The name derives from the fact that the treaties were negotiated by the then territorial governor Isaac I. Stevens, as representative of the United States. The so-called "Stevens" treaties are all the treaties which were entered into between the government and the Indians in the Pacific Northwest, then comprising the Washington Territory. The same or similar provisions which are here in issue "further securing" the Indians' fishing right are contained in all of the Stevens' treaties.

The ink was hardly dry on the Stevens' treaties until this provision became the subject of extensive litigation which has continued to the present time. It has three times been before this Court in *United States v. Winans*, 198 U.S. 371, *Seufert Brothers Co. v. United States*, 249 U.S. 194 (1919), and *Tulee v. Washington*, 315 U.S. 68 (1942).

In addition to these cases this provision was involved in Federal Court litigation in *Makah Indian Tribe v. Shoettler*, 192 F.2d 224, *McCauley v. Makah Tribe, etc.*, 128 F.2d 867; *The James G. Swan*, 50 Fed. 108 (U.S. D.C. Wash.) and *U.S. v. Alaska Packers Association*, 79 Fed 152 (U.S. D.C. Wash.).

As late as 1957, the Washington State Supreme Court

had before it the very issues which are now involved, and was unable to reach a decision. *State v. Satiacum*, 50 Wn.2d 513, 314 P.2d 400. Prior decisions of the Washington State Supreme Court involving this treaty provision are: *State v. Towessnute*, 89 Wash. 478, 154 Pac. 805; *State v. Alexis*, 89 Wash. 492, 154 Pac. 810, 155 Pac. 1041. *State v. Meninock*, 115 Wash. 528, 197 Pac. 641. *State v. Wallahee*, 143 Wash. 117, 255 Pac. 94. One case arose before the territory became a state, *United States v. Taylor* (1887), 3 Wash. Terr. 88, 13 Pac. 333. The *Tulee* case likewise arose from the State of Washington, 7 Wn.2d 124, 107 P.2d 280. The Idaho Supreme Court has considered the problem: *State v. Arthur*, 74 Ida. 251, 261 P.2d 135, and in *State v. McConville*, 65 Ida. 46, 139 P.2d 485, and the Montana court in *State v. McClure*, 127 Montana 534, 268 P.2d 629.

The rights, if any, reserved to the Indians by the treaty were even at that time valuable. With the increase in population and the increase in price and utilization of the products of the sea by the Whites, the conflict between the economic interests of the Whites and the treaty rights of the Indians has become tremendous. In general, the regulatory agencies, whether state or federal, have been attuned to the preservation of the resource and the economic interests of the White citizens rather than considerations of the treaty rights of the Indians. As a general rule, the lower Courts, perhaps more acutely aware of the feelings of local citizens than this Court, have been unfriendly to the Indians. As this Court noted in *U.S. v. Kagama*, 118 U.S. 375 (1886):

> "Because of the local ill-feeling, the people of the states where they (The Indians) are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the federal government with them, and the treaties in which it has been promised, there arises the duty of protection, and with it the power."

The State of Washington was criticized by the Court of Appeals of the Ninth Circuit for its narrow view of petitioner's treaty rights in *Makah Indian Tribe v. Shoettler,* 192 F.2d 224. Judge Mackintosh, of the Washington State Supreme Court in an early decision criticized his colleagues for a narrow interpretation of this treaty provision, saying, in *State v. Meninock,* 115 Wash. 528, 197 Pac. 641:

> "I have no patience with the violation of plain treaty provisions based in fact upon the strength of the violator and the weakness of the violated, but supported in theory by ingenious reasons and excuses."

Petitioner believes that one of the principal purposes of the Indian Claims Act was to provide a remedy in payment for rights so wrongly taken and set those matters to rest. To accomplish this broad purpose, a broad and liberal construction of the claimed rights is indicated, not a narrow one based upon assertions of implied conditions, inherent powers and "ingenious reasons."

In general; in all of these cases the litigants adhered to two extreme positions, which were noted as late as in the *Tulee* decision. These extremes are:

As taken by the regulatory bodies: That the right of the government to regulate fisheries was assumed by the parties to the treaty, *subsilencio*, and therefore the right to regulate the Indians is the same as its right to regulate all others. In general, this line of reasoning relies upon *Ward v. Race Horse*, 163 U.S. 504 (1896), and *Kennedy v. Becker*, 241 U.S. 556 (1916), and see the three decisions of Judge Hanford: *U.S. v. Winans*, 73 Fed. 72; *The James G. Swan*, 50 Fed. 108; and *U.S. v. Alaska Packers Association*, 79 Fed. 152.

As claimed by the Indians: That since their rights to fish were unrestricted at the time of the Treaty and these rights were "further secured" the Treaty assured them of the continued unrestricted right to fish.

In the *Winans* and *Tulee* cases, *supra*, this Court disavowed both extremes, and while upholding the claim of treaty rights against the limitations there sought to be imposed, said, in the *Tulee* case, that the treaty leaves "* * * power to impose on Indians, equally with others, such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish."

The question which is raised in this case and left open by this language is whether the *necessary* regulations which the treaty "leaves" the power to impose, are only those which are rendered necessary because of over-exploitation by the Indians or whether they may likewise be ones rendered necessary by over-exploitation by the Whites. Otherwise put, may the Whites, by their

own over-exploitation, create a "necessity" which justifies a regulation imposed equally upon the Indians and the Whites. Judge Madden, dissenting below, said:

> "Here, I think the government should be required to show that its regulatory purposes could not be accomplished without the restrictions on the Indians."

In *State v. Satiacum*, 50 Wn.2d 513, 314 P.2d 400, four Judges of the Washington Supreme Court felt that insofar as the above dictum said that regulations could be imposed upon the Indians *equally with others*, it was contrary to the holding of the case in which it was said. In a concurring opinion, also signed by four Judges of the Washington Court, it was said as follows:

> "The Court (below), however, felt that in such a case as this—where the enforcement of the regulation, if not reasonable and necessary, would infringe a treaty right of the Indian — the burden should be upon the state to show that the violation of the regulation by the Indian threatens the conservation program. I would uphold the trial court in its disposition of the cause, for it is true that the state made no attempt to show that the conservation program was seriously affected by the fishing activities of the defendants or of the Indians generally."

Petitioner believes the holding of *Makah Indian Tribe v. Shoettler*, 192 F.2d 224, is in direct accord with that language.

Petitioner respectfully submits that the opinions of eight Judges of the Washington State Supreme Court,

the decision of the Court of Appeals of the Ninth Circuit, and the decision of the Idaho State Supreme Court support the position of the petitioner as against the decisions below.

The inability of the Court below to define the limits of the power to regulate which this Court in the *Tulee* case said the treaty leaves, results from the failure to identify the source of the power. In the argument in the Court of Claims, counsel for the government asserted that every treaty entered into by the United States was subject to the implied term, condition or reservation of the right of the Government to exercise its police powers for conservation. Such rationale is, indeed, the explanation of some of the earlier decisions on this point. If this were so, then the Indians would have acquired no rights under the trgaty that they would not have otherwise possessed without a treaty, no more than the right to have the government refrain from arbitrary and discriminatory action. That's exactly what the lower Court decided in the *Winans* case, 73 Fed. 72, which was reversed in this Court. To that this Court said:

> "In other words, it was decided that the Indians acquired no rights but what any inhabitant of the territory or state would have. Indeed, acquired no rights but such as they would have without the treaty. This is certainly an impotent outcome to negotiations and a convention which seem to promise more, and give the word of the nation for more." *U.S. v. Winans*, 198 U.S. 371.

Petitioner asserts that a more rational basis of the source of the power to regulate is found in the treaty

itself. The government agreed to further secure the Indians in their fishing rights, and the Indians, in turn, agreed to let the Whites fish "In common." Since the treaty must be interpreted as the Indians understood it (*Tulee v. Washington*, 315 U.S. 68, and cases cited), it must be interpreted that while the Indians understood that they were to be further secured, they likewise understood that they must not fish in such a way as to destroy the rights of the Whites, which they granted to them. Four Judges of the Supreme Court of the State of Washington in the concurring opinion by Judge Rosellini in *State v. Satiacum*, hold this view and state with emphasis in their opinion:

> *"Inherent in the treaty is the implied provision that neither of the contracting parties would destroy the very right and bounty which each sought to share."*

If this is the source of the power to regulate, then the decision of the Indian Claims Commission was erroneous because the Government neither proved, nor even tried to prove, in defense of its regulations of the Makahs' fishing and sealing, that the activities of the Indians constituted any threat to the resource requiring regulation for conservation.

If the power of regulation was impliedly a condition of the treaty or if threat to the resource by depredation of the Whites justifies regulation of the Indians, then the decision of the Claims Commission is correct.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

J. DUANE VANCE
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